

Nadler Examines Necessary Reforms to the USA PATRIOT Act

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WASHINGTON, D.C. – Today, Congressman Jerrold Nadler (D-NY), Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, explored the efficacy of the USA PATRIOT Act and considered the ways in which this overbroad law needs to be reformed. The hearing, which Nadler chaired, specifically looked into the shortcomings of three soon-to-expire provisions within the USA PATRIOT Act Reauthorization and the Intelligence Reform and Terrorist Act.

“These three sunset provisions – dealing with roving wiretap authority, expansion of the definition of foreign agents, and increased access to business records – have aroused a great deal of controversy and concern,” said Nadler. “Going forward, we will have to make sure that our legislation provides effective investigative authority while protecting privacy and civil liberties. My bill, the National Security Letters Reform Act, would make vital improvements to the current law in order to better protect civil liberties and ensure that National Security Letters remain a useful tool in national security investigations. I have long believed that the two priorities of national security and civil liberties need not be in conflict.”

The USA PATRIOT Act, the USA PATRIOT Act Reauthorization and the Intelligence Reform and Terrorism Act were originally designed to improve the process of federal intelligence gathering. Subsequently, major issues have surfaced with the overall utility of those laws and how they may have restricted the constitutional rights and freedoms of American citizens. In addition to examining the Acts in general, today's hearing focused on the three sunset provisions: the USA PATRIOT Act's Section 206, the so-called “roving John Doe wiretaps,” which expanded wiretapping powers under FISA, and Section 215, which allowed the federal government broadened access to business and personal records; and, the “lone-wolf” provision, Section 6001(a) of the Intelligence Reform and Terrorism Act, which expanded the categories of potential targets of FISA investigations. These provisions are set to expire on December 31, 2009.

Among the expert witnesses at the hearing were: Todd Hinnen, Deputy Assistant Attorney General for National Security, U.S. Department of Justice; Suzanne Spalding, Principal, Bingham Consulting Group, and former Democratic Staff Director for U.S. House of Representatives Permanent Select Committee on Intelligence; Mike German, Policy Counsel, American Civil Liberties Union, and former Federal Bureau of Investigation Agent; Thomas B. Evans Jr., Chairman, the Evans Group, Ltd, and former Member of Congress (R-DE); and Kenneth Wainstein, Partner, O'squ;Melveny & Myers, LLP, and former Assistant Attorney General for National Security, U.S. Department of Justice.

Below is additional information on the sunset provisions of the law:

Section 206 of the USA PATRIOT Act – Roving Wiretaps

Section 206 of the USA PATRIOT Act amended FISA to permit multipoint, or “roving,” wiretaps by adding flexibility to the degree of specificity with which the location or facility subject to electronic surveillance under FISA must be identified. It is often described as allowing FISA wiretaps to target persons rather than places, and allows surveillance to continue even if a target switches communications devices or moves from location to location.

Some critics argue that wiretap orders issued pursuant to Section 206 violate the “particularity requirement” of the Fourth Amendment, which states that warrants shall, “particularly describ[e] the place to be searched.” In response to this criticism, the reauthorized provision states that the target must be described “with particularity” and requires the Federal Bureau of Investigation (FBI) to file a report to the Foreign Intelligence Surveillance Court (FISC) to explain why it believed the target was using the devices that the FBI tapped. Yet critics contend that the reauthorized provision does not require the government to name the target, or to ensure its roving wiretaps are intercepting only the target's communications.

Section 6001(a) of Intelligence Reform and Terrorism Protection Act - Lone Wolf

Section 6001(a) of the Intelligence Reform and Terrorism Protection Act, the "lone wolf" provision, changed the rules regarding the types of individuals that could be targets of FISA-authorized searches. It permits surveillance of non-U.S. persons engaged in international terrorism without requiring evidence linking those persons to an identifiable foreign power or terrorist organization. This provision was created in response to the FBI's attempt to obtain a FISA order to search the laptop of Zacarias Moussaoui in October, 2001. The Bureau believed it had insufficient information to demonstrate that Moussaoui was an agent of a foreign power, as required by FISA at the time, although the term "foreign power" included international terrorist groups. Under the current "lone wolf" provision, any subject of an investigation suspected of engaging in international terrorism is presumptively considered to be an agent of a foreign power or terrorist group.

Critics of the lone wolf provision argue that, because terrorism is a crime, investigators could simply obtain a standard wiretap order from a criminal court and, therefore, this provision is unnecessary.

Section 215 of the USA PATRIOT Act - Tangible Evidence Procurement

Section 215 of the USA PATRIOT Act allows the government to obtain a FISC order requiring private parties to produce "tangible things" such as business records that are relevant to foreign intelligence investigations. To issue such an order, the FISC or a magistrate judge need only find that the FBI has made "a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized [foreign intelligence] investigation." Such orders may not disclose their purpose, however, and those receiving them may not disclose their existence. This last provision is often referred to as a "gag rule."

The concerns with Section 215 orders arise from the government's ability to obtain orders for private records or items belonging to people who are not even under suspicion of involvement with terrorism or espionage, including U.S. citizens and lawful resident aliens, not just foreigners. Additionally, because Section 215 orders come with compulsory non-disclosure orders, or "gags," it has contributed to the perception of secrecy surrounding how they are being used.